TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 364.

DANIEL H. REYNOLDS, LEVI H. SPRINGER, AND SAMUEL F. HALLEY, APPELLANTS,

vs.

THOMAS BURNS AND MARTHA B. BURNS, HIS WIFE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED MAY 14, 1888.

1 Be it remembered that on the twentieth day of December, A. D. 1886, came into the office of the clerk of the circuit court of the United States for the eastern district of Arkansas Daniel H. Reynolds, Levi H. Springer, and Samuel F. Halley, by Compton and Compton and D. H. Reynolds, Esqs., their solicitors, and filed therein their bill of complaint against Thomas Burns and Martha B. Burns, his wife; which bill of complaint is in the words and figures as follows, to wit:

In the Circuit Court of the United States for the Eastern District of Arkansas.

DANIEL H. REYNOLDS, LEVI H. SPRINGER, and SAMUEL F. HALLEY *vs.* THOMAS BURNS and MARTHA B. BURNS, His Wife.	Suit to Injoin Judgment at Law.

Your orators, Daniel H. Reynolds, Levi H. Springer, and Samuel F. Halley, citizens of the State of Arkansas, the three defendants against whom judgment was rendered in the suit No. 3668 on the law side of this court, at the April term, 1886, wherein Thomas Burns, who sues as Robert Burns, and Martha B. Burns, his wife, are plaintiffs and Daniel H. Reynolds, Levi H. Springer,
2 Samuel F. Halley, Hiliary H. Halley, Watt C. Halley, and Richard Hurt are defendants, bring this their bill against said Thomas Burns and said Martha B. Burns, his wife, alleged citizens of the State of Mississippi, in continuation of said litigation, and seek to have said judgment at law perpetually injoined.

And thereupon your orators say that at the time of the execution of said deed of November 19th, 1866, said America A. Bowie, the executrix of the will of said John J. Bowie, with the assets of said estate and her own assets and with aid and assistance of her son, James W. Bowie, had so far administered on and closed up said estate and paid its debts, including the legacy to said Martha B. Leatherman, now Martha B. Burns, that there was nothing due to or from said estate except the sum of six thousand two hundred and thirty-four dollars and forty-one cents due from the estate to her upon settlement with the probate court, and the only assets remaining unadministered consisted of the interest of said estate in the following-described lands, to wit:

3 West half of S. W. qr. sec. 27, S. E. qr. sec. 28, west half sec. 28, all sec. 29, N. W. qr. sec. 32, west half N. E. qr. sec. 32, and east half of N. E. qr. sec. 33, all in township 13 south, in range 2 west, in Chicot county, and a few head of cattle and a few head of hogs; and all persons interested in the said estate, under the will or otherwise, were dead except the said Mrs. Bowie and said Martha B. Leatherman, and said Mrs. Bowie, besides her interest for life in the property of the estate under the will, had said judgment in the probate court for $6,234.41, and for which all of said

property, then not worth $6,000.00, was under the law primarily liable, and subject to be sold under the order of said probate court to pay off said balance of $6,234.41 and the expenses of the sale thereof; and said Mrs. Bowie was then in possession of said property and entitled to retain possession thereof until the estate was finally closed up and her judgment paid off so far as the said property as assets would extend, and also had an interest as heir
4 of her sons in certain of said lands, and said Mrs. Bowie desired to retire from the control and management of said estate, and out of her said several interests to provide for her comfort and quiet in her declining years and to leave the remainder of her said interests to the said Martha B. Leatherman. At that time said Martha B. had no real or equitable interest of value in said lands or other property, as same was not worth enough to pay the amount then due to her mother, and she could have no interest, under the will or otherwise, except her legacy, which she had received, until after the close of the administration, and then only in any balance after payment of debts and expenses of administration, but she was the owner of a mere naked legal title, subject to a life interest to a one-third part thereof, the whole of said property and estate being subject to the payment of the debts and expenses of administration of said estate, which debts and expenses exceeded in amount the entire value of the estate remaining unadministered,
5 and the said Martha B. and her then husband desired to enter into possession of said property and were willing to agree to provide for Mrs. Bowie out of said property and estate and avoid the necessity and expense of a sale thereof to pay the amount due to Mrs. Bowie and to accept the property and estate from Mrs. Bowie, subject to the burdens named in said deed, and it was then agreed between the parties, Mrs. Bowie, Martha B., and her then husband, that, in consideration of the interests of said Mrs. Bowie in said estate and of her claim or judgment for $6,234.41 and of her interest, through her sons, in the west half sec. 28, west half of N. W. qr. sec. 32, and east half of N. E. qr. sec. 33 aforesaid, in which her sons, at their death, held an interest under title not derived from or through said John J. Bowie, she holding same as heir to her said sons, John R. Bowie and James W. Bowie, and in order to get the immediate possession and
6 control of said property, that said Martha B. and her husband should pay to Mrs. Bowie an annuity of $400.00 for her life and to provide her a home or in lieu of a home $200.00 a year for her life, and Mrs. Bowie to reserve a lien and the right to sell any part of the property of said estate to secure the payment of any of the installments of said annuity. By this agreement Mrs. Bowie was to transfer all her interests in or connected with said estate or derived from her sons to them, and they were to accept same and bear the burden of her support to the extent of $400 a year and a home or $200 in lieu of a home and to pledge their existing and acquired interests to secure performance of the agreement on their part; and this agreement was intended to be and, it is submitted, was embodied in said deed of November

19th, 1866, which was intended to be duly executed by all the parties at the time in good faith, and possession was delivered to said Martha B. and her husband under and
7 in pursuance of said sale; that by said sale and transfer for the consideration named said Martha B. and her husband acquired the possession and the equitable and better title to said property and the naked legal title to the life interest in one-third part of the property of said estate, merging the equitable title and rights of her mother with the naked legal title that she held subject to such rights under the will and by inheritance, and thus acquired a good title to what she before had held a mere naked legal title that could have been extinguished by sale to pay said judgment in favor of her mother, and but for such private sale would have been extinguished by the enforcement of the rights of Mrs. Bowie through sale under order of the probate court, subject to the lien reserved in and granted by said deed of November 19th, 1866; that after said Martha B. and her husband had entered into possession of said property under their purchase they or she alone there-
8 after and prior to May 1st, 1876, the date of the sale to these plaintiffs, sold and transferred to various parties parts of the lands so acquired—that is to say, to C. H. Carlton, as trustee, the west half sec. 28 and west half of N. W. qr. sec. 32; to Emily Jackson, that part of east half of N. W. qr. sec. 32 that lies west of Crooked bayou; to Hiliary H. Halley, the north half of N. W. qr. sec. 29 and seven acres off of north part of S. half of N. W. qr. sec. 29, lying east of Crooked bayou; to Richard Hurt, that part of S. W. qr. of S. W. qr. sec. 29 lying south of the railroad; to Watt C. Halley, that part of S. half of N. W. qr. sec. 29 west of Crooked bayou and that part of S. W. qr. sec. 29 lying west of Crooked bayou and north of the railroad—and had also consumed or disposed of the said personal property.

And your orators further state that the said Martha B. and her then husband failed and neglected to pay the annuity and provide a home for Mrs. Bowie, as arranged for in said deed, and in March, 1876, there then being due and unpaid on said annuity, in-
9 cluding interest, over $1,300.00, the said Mrs. Bowie, under the authority contained in said deed, advertised that she would, on May 1st, 1876, sell said lands, or so much thereof as might be necessary to pay the annuity then due and unpaid, and at said sale your orators each purchased certain tracts or parts of said lands and paid for same the full value thereof for a good title thereto under the impression and belief that by such purchase they acquired a good title to so much of said lands. The said Reynolds purchased the east half sec. 29 and that part of west half sec. 29 lying east of Crooked bayou and not theretofore sold to Hiliary H. Halley, in all some 385 acres, for the sum of $1,180.00, and said Springer purchased the S. W. qr. of N. E. qr. sec. 32 and that part of S. E. qr. of N. W. qr. sec. 32 lying east of Crooked bayou, some 60 acres, for $40.50, and said Samuel F. Halley purchased the N. W. qr. of N. E. qr. sec. 32 and that part of N. E. qr. of N. W. qr. sec. 32 lying east of Crooked bayou, some 58 acres, for $71.00,

the tract purchased by Reynolds being partly improved and
10 the tracts purchased by Springer and by Halley being unimproved. The said Halley has since improved his tract and occupied it as a homestead, and still so occupies it with his wife and little children; that each of your orators received a deed for the tracts purchased by them from Mrs. Bowie under the power contained in said deed of November 19, 1866, and each entered into possession of the tracts purchased by them and have ever since remained in possession as the owners thereof.

That the proceeds of said sale paid by these plaintiffs went to the support of Mrs. Bowie, when it would have gone, but for the sale of November 19th, 1866, to the extinguishment of all interest of said Martha B.; that after this money had been expended to pay the annuity contracted to be paid by said Martha B. she sought, by said suit No. 3668, to recover back the lands to which she could in no event be equitably entitled except upon payment of the money
11 due to her mother prior to November 19, 1866, under the laws and judgment of the court, or since, under the terms of the deed, she allowed the property to be sold to furnish the support to her mother that she had agreed to furnish as the consideration for the property and then sought to recover back the property and has obtained judgment therefor in said suit on the law side of this court, as plaintiffs suppose, upon her naked legal title under said will and inheritance, when in fact she had no equitable or just title to same and could have none except after payment of debts and expenses of administration or through her purchase, subject to the reservations therein named, and said administration was never closed in any manner — than by the said purchase and sale, as evidenced by said deed of November 19, 1866; that to enforce said judgment would in effect make these plaintiffs support Mrs. Bowie and give to said Martha B., free, the property that was in the hands of Mrs. Bowie for her support and was only conveyed by her
12 upon the promise of such support as a consideration for such conveyance. A copy of said judgment is herewith filed and marked Exhibit A 1 and made part hereof. A copy of said judgment or allowance for $6,234.41 is herewith filed and marked Exhibit X 1 and made part hereof. A copy of said will of John J. Bowie and a copy of said deed of November 19, 1866, and copies of the deeds from Mrs. Bowie to your orators are herewith filed, the same being also on file as exhibits in said suit No. 3668 on the law side of this court.

And your orators submit that by the sale and transfer of the several interests of Mrs. Bowie in the said property and in the estate of the said John J. Bowie to said Martha B. and her husband, reserving the lien and right to sell the property of said estate on default of the payment of the consideration of said sale and transfer, and through the execution of said deed by said Martha B. and her husband,
13 the said Mrs. Bowie had a right to subject the entire interest of all parties in and to said deed to secure the payment of the annuity secured or intended to be secured to her by the deed of November 19, 1866, and by such sale and purchase on May 1, 1876,

your orators acquired the legal title and with it the right of possession to the lands in controversy, and if not the legal title, then at least the equitable and better title, and all the rights, interests, estates, and privileges, including the right of possession held by Mrs. Bowie at the time of the sale, on November 19th, 1866, and that were transferred to said vendees or left in abeyance by such sale, including the right to possession and the right to have all of said property sold to pay the said judgment of $6,234.41; and that inasmuch as it will not be possible to restore all parties to their rights as at that time, owing to rights acquired by third parties through said Martha B. or otherwise, and as the proceeds of the property purchased
14 by plaintiffs *has* gone to the support of Mrs. Bowie, where it would in any event, under the law prior to November 19th, 1866, or under the agreement indeed since that time, have properly gone, the plaintiffs submit that the just and equitable rights of all parties hereto will be secured by confirming the title of plaintiffs to the tracts purchased by them and by perpetually injoining said Martha B. and all persons claiming by or through her from interfering with said plaintiffs or with their successors in ownership.

The premises considered, plaintiffs pray that said Martha B. and said Thomas Burns and their agents and attornies may be injoined from executing or enforcing said judgment against them in said suit No. 3668 until the further order of this court; that said defendants, Thomas Burns and Martha B. Burns, may be required to answer this bill, but not under oath, and that on final hearing that such injunction may be made perpetual, and that plaintiffs may have such other and further relief as may be equitable and just to them.

COMPTON & COMPTON,
15 D. H. REYNOLDS,
Solicitors for Plaintiffs.

STATE OF ARKANSAS, }
County of Chicot, } *ss:*

The plaintiff D. H. Reynolds states on oath that he has read the above and foregoing bill of complaint, and that the facts therein set forth on his information are true, and that such as are set forth on the information of others he believes are true.

D. H. REYNOLDS.

Sworn to before me on this 7th day of October, 1886.

[SEAL.] JOHN C. CONNERLY,
Notary Public for Chicot County, Ark.

Endorsed: Filed December 20, 1886. Ralph L. Goodrich, clerk.

Exhibits to Bill.

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Deed.

America A. Bowie
to
Daniel H. Reynolds.

This deed of conveyance, made this 30th day of May, 1876, by America A. Bowie, of Terre Bonne parish, Louisiana, to Daniel H. Reynolds, of Chicot Co., Arkansas, witnesseth:

That whereas the said America A. Bowie was duly authorized and empowered by deed duly executed and acknowledged and recorded in the recorder's office in Chicot county in Record Book of Deeds "L," pages 252, 253, & 254, to sell any of the lands of the estate of John J. Bowie, deceased, and empowered in said deed upon default of the payment of a certain annuity to her, as in said deed provided, after giving thirty days' notice of such intended sale by advertisements in five of the most public places in said county; and whereas default in payment of said annuity was made for several years and notice of said sale was duly given, as provided for in said deed, fixing Saturday, May 1st, 1876, as the day for the sale of such property; and whereas on the 1st day of May, 1876, the sums due upon said annuity remaining unpaid, she did, by virtue of

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authority in said deed mentioned and in pursuance of such notice, sell the lands hereinafter described at public auction to Daniel H. Reynolds, of said county of Chicot, for the sum of eleven hundred and eighty dollars, he being the highest bidder therefor and the purchaser thereof; and whereas said Daniel H. Reynolds has paid said sum of eleven hundred and eighty dollars:

Now, therefore, be it known that the said America A. Bowie, by virtue of the power in her vested as aforesaid and in consideration of said sum of eleven hundred and eighty dollars to her paid by said Daniel H. Reynolds, has granted, bargained, and sold, and does by these presenes grant, bargain, and sell, unto the said Daniel H. Reynolds and his heirs the following-described lands, lying and being situate in said county of Chicot, to wit, the E. ½ sec. 29; that part of S. W. ¼ sec. 29 east of Crooked bayou except some seven and one-half acres off the north part of last-described tract sold to Hiliary H. Halley, and except also one-half acre, including the grave-yard, and one acre, known as the Anderson lot, on south

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of railroad and this day conveyed to him, and also the Trice and Allen lot, this day conveyed to Mrs. E. Trice, all in township thirteen, in range two west, and containing three hundred and eighty-five acres, more or less, together with all the privileges and appurtenances thereto belonging or in anywise appertaining:

To have and to hold the aforegranted premises unto the said Daniel H. Reynolds and to his heirs, to his and their use and behoof forever; and the said America A. Bowie, for herself, her heirs, executors, and administrators, does hereby covenant with the said Daniel

H. Reynolds, his heirs and assigns, that in pursuance of said deed public notice was given as hereinbefore set forth.

In testimony whereof the said America A. Bowie has hereunto set her hand and seal this 30th day of May, A. D. 1876.

A. A. BOWIE. [SEAL.]

STATE OF LOUISIANA, }
Parish of Terre Bonne. }

Be it remembered that on this 10th day of August, 1876, before
19 me, the undersigned, clerk of the 15th judicial district court within and for the parish aforesaid, duly commissioned and qualified and acting, personally appeared Mrs. America A. Bowie, to me well known as the grantor in the foregoing deed of conveyance, and stated and acknowledged that the had executed the same for the consideration, uses, and purposes therein mentioned and set forth, and — her request I do so certify.

In testimony whereof I, A. Bourg, as such clerk, have
[SEAL.] hereunto set my hand and affixed my official seal, at the parish aforesaid, this 10th day of August, A. D. 1876.

A. BOURG,
Clerk of said Court.

Filed for record Aug. 16, 1876, and recorded September 20, A. D. 1876.

H. W. GRAVES, *Clerk*,
By GEO. T. WILKINSON, *D. C.*

STATE OF ARKANSAS, }
County of Chicot. }

I, George T. Wilkinson, clerk of the circuit court and *ex officio* re-
corder, hereby certify that the foregoing three pages contain
20 a true and correct copy of the within-named deed as the same appears of record in Record Book "T," pages 482 & 483, in my office.

In testimony whereof I have hereunto set my hand, as
[SEAL.] such clerk, and affixed the seal of my office this 16th day of July, 1886.

GEO. T. WILKINSON, *Clerk.*

Deed.

America A. Bowie }
to
Samuel F. Halley. }

This deed of conveyance, made this 30th day of May, A. D. 1876, by America A. Bowie, of Terre Bonne parish, Louisiana, to Samuel F. Halley, of Chicot county, Arkansas, witnesseth:

That whereas the said America A. Bowie was duly authorized and empowered by deed duly executed and acknowledged and recorded in the recorder's office of Chicot county in Record Book of Deeds

"L," pages 252, 253, and 254, to sell any of the lands of the estate of John J. Bowie, deceased, and embraced in said deed upon
21 default of the payment of a certain annuity to her, as in said deed provided, after giving thirty days' notice of such intended sale by advertisements in five of the most public places in said county of Chicot; and whereas default in the payment of said annuity was made for several years and notice of said sale was duly given, as provided for in said deed, fixing Monday, May 1st, 1876, as the day of the sale of such property; and whereas on said 1st day of May, 1876, the sums due upon said annuity remaining unpaid, she did, by virtue of the authority in said deed mentioned and in pursuance of such notice, sell the lands hereinafter described at public auction to Samuel F. Halley, of said county of Chicot, for the sum of seventy-one dollars, he being the highest bidder therefor and the purchaser thereof; and whereas said Samuel F. Halley has paid said sum of seventy-one dollars:

Now, therefore, be it known that the said America A. Bowie, by virtue of the power and authority in her vested, as provided,
22 and in consideration of said sum of seventy-one dollars to her paid by the said Samuel F. Halley, has granted, bargained, and sold, and does by these presents grant, bargain, sell, and convey, unto the said Samuel F. Halley and his heirs the following-described lands, lying and being situate in said county of Chicot, to wit, the N. W. ¼ of N. E. ¼ sec. 32 and part of N. E. ¼ of N. W. ¼ sec. 32, lying east of Crooked bayou, all in township 13 south, in range two west, and containing some fifty-eight acres, more or less, together with all the privileges and appurtenances thereto belonging or in anywise appertaining:

To have and to hold the aforegranted premises unto the said Samuel F. Halley and to his heirs, to their and his use and behoof forever; and the said America A. Bowie, for herself, her heirs, executors, and administrators, does hereby covenant with the said Samuel F. Halley, his heirs and assigns, that in pursuance of said deed public notice was given as hereinbefore set forth.

In testimony whereof the said America A. Bowie has here-
23 unto set her hand and seal this 30th day of May, A. D. 1876.

A. A. BOWIE. [SEAL.]

STATE OF LOUISIANA,
Parish of Terre Bonne.

Be it remembered that on this 4th day of August, A. D. 1876, before me, the undersigned, clerk of the fifteenth judicial district court within and for the parish aforesaid, duly commissioned, qualified, and acting, personally appeared Mrs. America A. Bowie, to me well known as the grantor in the foregoing deed of conveyance, and stated and acknowledged she had executed the same for the consideration, uses, and purposes therein mentioned and set forth, and at her request I do hereby so certify.

In testimony whereof I, A. Bourg, as such clerk, have
[SEAL.] hereunto set my hand and affixed my official seal, at the parish aforesaid, the 4th day of August, A. D. 1876.

A. BOURG,
Clerk of said Court.

24 Filed and recorded June 11th, 1877.

H. W. GRAVES, *Clerk,*
By GEO. T. WILKINSON, *D. C.*

STATE OF ARKANSAS, }
County of Chicot. }

I, George T. Wilkinson, clerk of the circuit court and *ex officio* recorder, hereby certify that the foregoing three pages contain a true and correct copy of the deed therein named as the same appears of record in Record Book "M," pages 466 & 467, in my office.

In testimony whereof I have hereunto set my hand, as
[SEAL.] such clerk, and affixed the seal of my office this 16th day of July, 1866.

GEO. T. WILKINSON, *Clerk.*

Deed.

America A. Bowie }
to
L. H. Springer. }

This deed of conveyance, made this 30th day of May, 1876, by America A. Bowie, of Terre Bonne parish, Louisiana, to L. H.
25 Springer, of Chicot county, Arkansas, witnesseth:

That the said America A. Bowie was duly authorized and empowered by deed duly executed and acknowledged and recorded in the recorder's office of Chicot county in Record Book of Deeds "L," pages 252, 253, and 254, to sell any of the lands of the estate of John J. Bowie, deceased, and embraced in said deed upon default of the payment of certain annuity to her, as in said deed provided, after giving 30 days' notice of such intended sale by advertisements in five of the most public places in said county of Chicot; and whereas default in the payment of said annuity was made for several years and notice of said intended sale was duly given, as provided for in said deed, fixing Monday, May the 1st, 1876, as the day for the sale of said property; and whereas on said 1st day of May, 1876, the sums due upon said annuity remaining unpaid, she did, by virtue of the authority in said deed mentioned and in pursuance of
26 such notice, sell the lands hereinafter described at public auction to L. H. Springer, of said county of Chicot, for the sum of one hundred and forty and $\frac{50}{100}$ dollars, he being the highest bidder therefor and the purchaser thereof; and whereas said L. H. Springer has paid the sum of one hundred forty and $\frac{50}{100}$ dollars: Now, therefore, be it known that the said America A. Bowie, by virtue of the power and authority in her vested as aforesaid and in

consideration of the said sum of one hundred forty and $\frac{50}{100}$ dollars ($\$140\frac{50}{100}$) to her paid by the said L. H. Springer, has granted, bargained, and sold, and does by these presents grant, bargain, sell, and convey, unto the said L. H. Springer and his heirs the following-described lands, lying and being situate in said county of Chicot and State of Arkansas, to wit, the S. W. ¼ of N. E. ¼ and part, east of Crooked bayou, of S. E. ¼ of N. W. ¼ sec. 32; also p't of S. E. ¼ of S. W. ¼ S. of R. R. and west of Bayou Mason, of sec. 29, all in township 13, R. 2 W., containing in the aggregate eighty-five acres, more or less, together with all the privileges and appurtenances thereunto belonging or in anywise appertaining; to have and to
27 hold the aforegranted premises unto the said L. H. Springer and to his heirs, to his and their use and behoof forever; and the said America A. Bowie, for herself, her heirs, executors, and administrators, does hereby covenant with the said L. H. Springer, his heirs and assigns, that in pursuance of said deed public notice was given as hereinbefore set forth.

In testimony whereof the said America A. Bowie has hereunto set her hand and seal this 30th day of May, A. D. 1876.

A. A. BOWIE. [SEAL.]

STATE OF LOUISIANA, }
Parish of Terre Bonne. }

Be it remembered that on this 4th day of August, 1876, before me, the undersigned, clerk of the 15th judicial district within and for the parish aforesaid, duly commissioned, qualified, and acting, personally appeared Mrs. America A. Bowie, to me well known as the grantor in the foregoing deed of conveyance, and stated and acknowledged that she had executed the same for the consid-
28 eration, uses, and purposes therein mentioned and set forth, and at her request I do hereby so certify.

In testimony whereof I, A. Bourg, as such clerk, here-
[SEAL.] unto set my hand and affix my official seal, at the parish aforesaid, this 4th day of August, A. D. 1876.

A. BOURG,
Clerk of said Court.

Filed for record Sept. 14th, A. D. 1876, and recorded October, 25th, 1876.

H. W. GRAVES, *Clerk,*
By GEO. T. WILKINSON, *D. C.*

STATE OF ARKANSAS, }
County of Chicot. }

I, George T. Wilkinson, clerk of the circuit court and *ex officio* recorder, hereby certify that the foregoing three pages contain a true and correct copy of the deed therein named as the same appears of record in Record Book "T," pages 570 & 571, in my office.

In testimony whereof I have hereunto set my hand as
[SEAL.] such clerk and affix- the seal of my office this 16th day of July, 1886.

GEO. T. WILKINSON, *Cl'k.*

29 Copy.

Last Will and Testament of John J. Bowie.

I, John J. Bowie of sound and disposing mind and memory but somewhat bodily afflicted bringing to mind that it is the common lot of all men to die and having been repeatedly warned within the last few weeks that the time was not far distant when I would have to go the way of all flesh, prompted by the above warnings, I now declare the following to be my last will and testament.

In the first place I wish to be buried in a plain way and never have any tomb or other marks of respect placed over or about my grave; and further I am in hopes that none of my family or friends will ever wear mourning for me. I go the way that all before me have gone, and all I leave behind me will soon follow. I have five heirs by my first wife, namely: Mary Bennett, Sarah Stuart, John Bowie Jr., a minor son of Reason Bowie, deceased; Nancy Sanford and Matilda Hernor, all of which I have heretofore given
30 what I believe to be an equal and full share of my estate; and I hope and request that none of them will interfere with my younger children property left them by this will. I have also one other daughter Harriett E. Hollingsworth; the same has been done for her as was for my first family of children. My present wife also had two children before we were married, namely, William P. Kirkland, and his sister Mrs. Elizabeth Hamilton. Both of them I have also done all I think it was my duty to do.

Whatever estate I now own or possess, either real or personal, I wish to dispose of it as follows, to wit:

First, to pay all of my just debts; after this is done the first proceeds arising out of the estate of one thousand dollars is to be paid to Martha B. Leatherman, which must be done in five years from the date hereof, which will be in full for her part of my estate: the balance to be equally divided between my wife America A. Bowie and our two sons John R. Bowie and James W. Bowie; and it is further my desire and request that America A. Bowie
31 my wife be left sole executrix of this my last will and that she and our two sons be allowed to manage their estate without giving any security for their acts. And I further desire that in the event of the death of my wife, that her estate be equally divided between our three children, Martha, John and James; and I further request that the girl Mary be sold and the money arising from the sale, be paid over to Messrs. Fondlin & Co. of Vicksburg of whom I purchased her to prevent fraud from being practiced on my estate.

I have inclosed a correct list of all my just debts.

I now declare this to be my last will, and hereby revoking all my former wills written by myself at my residence this 29 day of September, A. D. 1853.

JOHN J. BOWIE.

Attest:
D. W. C. BANHAN.
SAM'L NELSON.
P. G. SCRUGGS.

STATE OF ARKANSAS, } *sct:*
County of Chicot, }

32 In the Court of Probate in said County, in Term Time.

Be it remembered that on this 8th day of August, A. D. 1859, in open court was exhibited for probate the annexed instrument of writing, purporting to be the last will and testament of John J. Bowie, deceased, late of said county of Chicot, by America A. Bowie, therein appointed executrix; and at the same time came before the court William J. Neal, James M. Austin, and John Livingstone to prove said will, and thereupon the said William J. Neal, James M. Austin, and John Livingstone, having been first duly sworn in open court, on their oaths state that they were familiar with his handwriting, having often seen him write and sign his name, and that the annexed and foregoing will and also the signature thereto are each and all in the proper handwriting of the said John J. Bowie, deceased.

WM. J. NEAL.
JAS. M. AUSTIN.
JOHN LIVINGSTON.

Sworn to and subscribed in open court this 8th day of
33 August, A. D. 1859.

B. F. STEPHENSON, *Clerk.*

Filed for record August 8th, A. D. 1859, and recorded August 22, 1859.

Attest: B. F. STEPHENSON, *Cl'k.*

STATE OF ARKANSAS, }
County of Chicot. }

I, George T. Wilkinson, clerk of the circuit court and *ex officio* clerk of the probate court, hereby certify that the foregoing three pages contain a true and correct copy of the last will and testament therein named as the same appears of record in the records of wills, in Book "C," pages 146, 147, & 148, in my office.

In testimony whereof I have hereunto set my hand, as
[SEAL.] such clerk, and affixed the seal of my office this 16th day of July, 1886.

GEO. T. WILKINSON, *Clerk.*

July Term of the Chicot Probate Court, August 14th, 1866—6th Day.

Be it remembered that on this day in said probate court,
34 among others, the following proceedings were had, to wit:

Final Account Current.

In the Matter of Estate J. J. BOWIE. 179.

This day is presented to the court the ac. current of America A. Bowie, executrix of the estate of Jno. J. Bowie, dec's'd, which was

filed at a former term of this court and continued over subject to the inspection, &c., of all concern-d; and no exceptions having been made to the same or any item thereof, and the court having carefully examined the same doth find that, after charging said executrix with all assets that have come to her hands and giving her credit for all moneys lawfully paid on account of said estate, there remains a cash balance in favor of said executrix amounting to the sum of six thousand two hundred and thirty-four $\frac{41}{100}$ ($6,234\frac{41}{100}$) dollars, for which amount the said estate is indebted to the said executrix at this settlement.

35 Ordered that said settlement so made as aforesaid be, and the same is hereby, approved and confirmed, and that it be spread on the records of administrator's accounts.

STATE OF ARKANSAS, }
County of Chicot. }

I, George T. Wilkinson, clerk of the circuit court and *ex officio* clerk of the probate court, hereby certify that the foregoing is a true and correct copy of the order therein named as the same appears of record in Probate Record C, page 457, in my office.

In testimony whereof I hereunto set my hand, as such [SEAL.] clerk, and affix the seal of my office this 16th day of July, 1886.

GEO. T. WILKINSON, *Clk.*

This indenture, made and entered into this the 19th day of November, A. D. 1866, by and between America A. Bowie, party of the first part, and Zacharia Leatherman and Martha B.

36 Leatherman, his wife, parties of the second part: For that whereas John J. Bowie, late a citizen of the county of Chicot and State of Arkansas, departed this life on or about the 22nd day of June, A. D. 1859, having first made his last will and testament, whereby he willed and bequeathed that "all the estate he might have at its death, after paying his just debts" and "the sum of one thousand dollars to the said Martha B. Leatherman, should be equally divided between his wife and his two sons then living, John Bowie and James W. Bowie, the one-third given to his said wife (the said party of the first part hereto) should be for her life, and at her death should be divided between his two sons aforementioned and the said Martha B. Leatherman; and whereas since the death of said testator his said son- John and James have also departed this life before said testator's estate had been administered or divivided; and whereas also the said party of the first part, after the death of said testator and by virtue of her appointment in said will, took out letters testamentary on the estate of said testator and proceeded to administer the same to a final settlement in the probate court

37 of Chicot county, Arkansas, by which settlement there appears to be a balance due said administratrix from said estate amounting to $6,234.41;

And whereas the said party of the first part wishes to retire from

the management and control of said estate and to provide for her comfort and quiet in her declining years:

Now, therefore, this indenture witnesseth: That the said party of the first part, for the consideration and covenants hereinafter mentioned and specified, has this day remised, released, conveyed, and quitclaimed, and does hereby convey, remise, release, and forever quitclaim, unto the said parties of the second part all of her right, claim, or interest in the estate of the said John J. Bowie, deceased, whether that interest be by virtue of said will or by virtue of her being the mother and heir-at-law of the said sons, *of* John Bowie and James W. Bowie, deceased, or any other interest or possibility of claim which she may have to said estate from any cause whatever.

38 And also all of her claim upon or against said estate for any and all balances found to be due her from said estate, as administratrix, in her final settlement of said estate with probate court aforesaid. The consideration for the foregoing release and quitclaim is as follows: The said America A. Bowie is to take and have out of the property of said estate as her own absolute property, to do with and dispose of as she may think proper, and free from the terms or conditions of said will, six cows and calves and four sows and pigs, to be selected and chosen by said A. A. Bowie out of all the cattle and hogs belonging to said estate; and the said parties of the second part, for the consideration aforesaid, grant, bargain, and sell to the said party of the first part all their right, title, or claim to said six cows and calves and four sows and pigs which they may have by virtue of their being the heirs-at-law of the said John J. Bowie or as entitled to the succession of said estate; and the said Z. Leatherman (one of the parties of the second part) hereby

39 covenants and agrees to and with the said party of the first part to pay her the sum of four hundred dollars in cash each year of her natural life, said sum to be paid semi-annually, in advance, the first payment to be made on the 1st day of January, A. D. 1867; and the said party hereby retains a lien upon all the property of said estate for the full and prompt and full payment of said annuity; and it is herein expressly reserved and understood that if the said Z. Leatherman shall fail to make any one of the aforesaid semi-annual payments at the time the same falls due, then on such default the said party of the first part shall have the power and authority to sell, upon giving 30 days' notice at five of the most public places in this county, on the premises enough real estate, either personal or real, to satisfy such of said payments as shall be due and unpaid; and the said Z. Leatherman further covenants and agrees with the said party of the first part that she is to have a home at his

40 house during her natural life, or that he is to pay her, the party of the first part, two hundred dollars in addition to the sum of four hundred heretofore mentioned should he, the party of the second part, sell his present home and the party of the 1st not wish to remove with him, and is to take care of and provide for her during her said life, but he is not to furnish her with clothing; and it is further agreed and understood between the parties hereto that the

said parties of the second part are to take, have, and maintain the immediate possession of all of said estate except what has been hereinbefore reserved, and the said Z. Leatherman is to have immediate, full, and complete control of said estate, and is to assume all the liabilities of said estate.

In testimony whereof we, the said America A. Bowie, party of the first part, and Zacharia Leatherman and Martha B. Leatherman, his wife, parties of the secohd part, have hereunto set our
41 hands and seals this the day and year first hereinbefore written.

A. A. BOWIE. [SEAL.]
Z. LEATHERMAN. [SEAL.]
M. B. LEATHERMAN. [SEAL.]

Witness:
N. D. FUGNA.
J. F. LOWRY.

Interlined before signing.
J. F. LOWRY.

STATE OF ARKANSAS, }
County of Chicot. }

Be it remembered that on this the 4th day of December, A. D. 1866, before me, James McMurray, clerk of the circuit court and *ex officio* recorder in and for said county of Chicot, personally appeared N. D. Fugna, one of the subscribing witnesses to the foregoing deed, to me personally well known, who, being by me first duly sworn, on his oath stated that he saw each and all of said parties to said deed subscribe their name- on the day of the date thereof, and that each of said parties then and there acknowledged to him that they had executed said deed for the purposes and considerations therein
42 mentioned and set forth, and that he and J. F. Lowry subscribed the same as attesting witnesses at the request of said parties.

In testimony whereof I have hereunto set my hand, as such [L. S.] clerk, and affixed my seal of office this the day and year above written.

JAMES McMURRAY,
By GEO. C. GATEWOOD, *D. C.*

Filed for record Nov. 22, 1866, and recorded Dec. 4th, 1866, and duly rev. stamped.
Att.: JAMES McMURRAY, *Clerk.*

STATE OF ARKANSAS, }
County of Chicot. }

I, George T. Wilkinson, clerk of the circuit court and *ex officio* recorder, hereby certify that the foregoing five pages contain a true and correct copy of the deed therein mentioned as the same appears of record in Record Book "L," pages 252, 253, & 254, in my office.

In testimony whereof I hereunto set my hand, as such
[SEAL.] clerk, and affix the seal of my office this 16th day of July, 1886.

GEO. T. WILKINSON, *Clerk.*

43 Endorsed: Filed December 20, 1886. Ralph L. Goodrich, cl'k.

44 UNITED STATES OF AMERICA, }
Eastern District of Arkansas. }

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 25th day of October, anno Domini one thousand eight hundred and eighty-six, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on December 20th, 1886:

DANIEL H. REYNOLDS *et al.*
v. } 865.
THOMAS BURNS and MARTHA B. BURNS, His Wife.

On this day come said plaintiffs, by D. H. Reynolds, their solicitor, and also came said defendants, by U. M. & G. B. Rose and W. B. Street, their solicitors, and the court having duly considered the application for an injunction herein, the same is now by the court overruled, and said defendants, by their said solicitors, file herein their demurrer to the bill, which demurrer to bill is in words and figures following:

U. S. C't C't, E. Dist. Ark.

45 DANIEL H. REYNOLDS *et al.* }
v. }
THOMAS BURNS & WIFE. }

Come said defendants here and demur to said bill because they say that there is no equity in the same.

U. M. & G. B. ROSE.
W. B. STREET.

Endorsed: Filed Dec. 20, 1886. Ralph L. Goodrich, clerk.

46 UNITED STATES OF AMERICA, }
Eastern District of Arkansas. }

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the eleventh (11th) day of April, anno Domini one thousand eight hundred and eighty-seven, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable

Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on June 24, 1887:

Come the defendants, by U. M. & G. B. Rose, Esqs., their solicitors, and file herein their demurrer to the bill of complaint, and upon their motion said demurrer is set down for argument on Tuesday, June 28, 1887, which demurrer is in words and figures following:

In the United States Court for the Eastern District of Arkansas.

DANIEL H. REYNOLDS }
v.
THOMAS BURNS & WIFE. }

Come said defendants and demur to the bill filed herein
47 because they say that it shows no equity on its face.

U. M. & G. B. ROSE.
W. B. STREET.

Filed June 24, 1887.

RALPH L. GOODRICH, *Clerk.*

And on June 28, 1887, the following proceedings were had, to wit:

Come the complainants, by F. W. Compton, Esq., their solicitor, and come the defendants, by U. M. & G. B. Rose, Esqs., their solicitors, and the demurrer to the bill of complaint is heard, argued, and submitted to the court, and the court, not being now well and sufficiently advised in the premises, takes time to consider of its judgment herein.

And on July 20, 1887, the following proceedings were had, to wit:

The demurrer to the bill in this cause having been argued and submitted on a previous day of this term, and the court being now well and sufficiently advised in the premises, it is ordered,
48 adjudged, and decreed that said demurrer be sustained and the bill dismissed for want of equity at plaintiffs' costs; and thereupon said plaintiffs, by F. W. Compton, Esq., their solicitor, prayed an appeal from the decree in this cause to the Supreme Court of the United States, and said appeal is allowed.

49 UNITED STATES OF AMERICA, }
Eastern District of Arkansas. }

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the original remaining of record in my office.

In witness whereof I have hereunto set my hand and the seal of said court this eighth day of May, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and twelfth.

The Seal of the Circuit Court of East. Dist. Ark., Western Division, U. S. A.

RALPH L. GOODRICH, *Clerk*,
By W. P. FEILD, *D. C.*

Endorsed on cover: E. Arkansas C. C. U. S. No. 364. Daniel H. Reynolds, Levi H. Springer, & Samuel F. Halley, appellants, *vs.* Thomas Burns and Martha B. Burns' his wife. Filed May 14, 1888.

No. 364.

Supreme Court of the United States.

OCTOBER TERM, 1890.

DANIEL H. REYNOLDS, LEVI H. SPRINGER AND SAMUEL F. HALLEY, *Appellants.*

v.

THOMAS BURNS AND MARTHA B. BURNS, HIS WIFE, *Appellees.*

BRIEF FOR APPELLANTS.

The error complained of in this case is, that the circuit court sustained a demurrer to the bill for want of equity, when the same should have been overruled.

STATEMENT OF FACTS.

The plaintiffs in the case were the three defendants against whom judgment was rendered in the suit No. 3668, on the law side of the court below, at the April term, 1886, wherein Thomas, who sued as Robert Burns, and Martha B. Burns, his wife, were plaintiffs, and Daniel H. Reynolds, Levi H. Springer, Samuel F. Halley, Hilary H. Halley,

Watt C. Halley and Richard Hurt were defendants, and the bill in this case was brought against the said Thomas Burns and said Martha B. Burns, his wife, in continuation of the litigation in that suit and to have the judgment so recovered perpetually enjoined or to have the purchase money paid for the lands in controversy refunded.

The bill alleges substantially, that John J. Bowie departed this life after having first made his last will and testament in which the following language is contained:

"Whatever estate I now own or possess, either real or personal, I wish to dispose of it as follows, to-wit: First, to pay all of my just debts; after this is done the first proceeds arising out of the estate of one thousand dollars is to be paid to Martha B. Leatherman, which must be done in five years from the date hereof, which will be in full of her part of my estate; the balance to be equally divided between my wife, America A. Bowie, and our two sons John R. Bowie and James W. Bowie, and it is further my desire and request that America A. Bowie, my wife, be left sole executrix of this my last will, and that she and our two sons be allowed to manage their estate without giving any security for their acts. And I further desire that in the event of the death of my wife, that her estate be equally divided between our three children, Martha, John and James."

That Mrs. Bowie entered upon the discharge of her duties as such executrix, and that she, at the time of the execution of the deed between her and Z. Leatherman and Mar-

tha B. Leatherman, his wife, dated 19th day of November, 1866, and hereinafter more particularly referred to, with the assets of the estate and her own means and with the aid and assistance of her son, James W. Bowie, had so far administered and closed up the estate and paid its debts, including the legacy to Martha B. Leatherman—now Martha B. Burns—that there was nothing due to or from the estate except the sum of six thousand two hundred and thirty-four and $\frac{41}{100}$ dollars ($6,234.41), due from the estate to her upon settlement with the probate court, made and confirmed on the 14th day of August, 1866 (Rec., p. 12), and that the only assets remaining unadministered consisted of a few head of live stock, and the interest of the estate in the following described lands, to-wit: West half of S. W. quarter section 27, S. E. quarter section 28, west half of section 28, all section 29, N. W. quarter section 32, west half N. E. quarter section 33, all in township 13 South, in range 2 West, in Chicot county, Arkansas, a part of which are the lands here in controversy, and that all persons interested in the estate, under the will or otherwise, were then dead except Mrs. Bowie and Martha B. Leatherman.

That Mrs. Bowie, besides her interest for life in the property of the estate under the will, had the judgment in the probate court against the estate for $6,234.41, for the payment of which all the property of the estate, then not worth $6,000, was, under the law, primarily liable and subject to be sold under the order of the probate court; that Mrs. Bowie was then in possession of the property and en-

titled to retain possession thereof until the estate was finally closed up and her judgment paid off so far as the property as assets would extend, and also had an interest as heir of her sons in certain of said lands not derived by them from or through the testator, John J. Bowie, deceased; that Mrs. Bowie desired to retire from the control and management of the estate, and out of her several interests to provide for her comfort and quiet in her declining years, and to leave the remainder of her interests to her daughter, the said Martha B. Leatherman, who, at that time had no interest of value in the property of the estate, as the same was not worth enough to pay the amount then due to her mother, and she could have no interest under the will or otherwise, except her legacy, which she had received, until after the close of the administration, and then only in any balance after the payment of debts and expenses of administration, but was the owner of a mere naked legal title, subject to a life interest in a one-third part thereof, the whole of the property of the estate being subject to the payment of debts and the expenses of administration, which debts and expenses exceeded in amount the entire value of the estate remaining unadministered; that the said Martha B. and her then husband desired to enter into possession of the property of the estate and were willing to agree to provide for Mrs. Bowie out of it and thereby avoid the necessity and expenses of a sale thereof to pay the amount due to Mrs. Bowie; that it was thereupon agreed between the parties—Mrs. Bowie, Martha B. and her then husband—that in consideration of the interests of Mrs. Bowie in the estate and of her claim or

judgment for $6,234.41, and of her interest through her sons, in the west half sec. 28, west half of N. W. qr. sec. 32, and east half of N. E. qr. sec, 33, aforesaid, in which her sons, at their death, held an interest under title not derived from or through John J. Bowie, deceased, she holding the same as heir to her said sons, John R. Bowie and James W. Bowie, and of the immediate possession and control of the property, that Martha B. and her husband should pay to Mrs. Bowie an annuity of $400 for her life, and should provide her a home, or in lieu of a home $200 a year for life, and that Mrs. Bowie should reserve a lien and right to sell any part of the property of the estate to secure the payment of any of the installments of the annuity; that by this agreement Mrs. Bowie was to transfer to them all her interests in or connected with the estate or derived from her sons, and they were to accept the same and bear the burden of her support to the extent of $400 a year and a home, or $200 in lieu of a home, and to pledge their existing and acquired interests to secure performance of the agreement on their part; and that this agreement was intended to be and was embodied in the deed of November 19, 1866, hereinbefore mentioned, which was intended to be duly executed by all the parties at the time in good faith, and that possession was delivered to Martha B. and her husband under and in pursuance of the sale. See deed on page 13 of the record.

The bill further alleges that Martha B. and her then husband neglected and failed to pay the annuity and provide a home for Mrs. Bowie, as stipulated in the deed; and that

in March, 1876, there being then due and unpaid on the annuity, including interest, over $1,300, Mrs. Bowie, under the authority contained in the deed, advertised that she would, on May 1, 1876, sell the lands or so much thereof as might be necessary to pay the annuity then due and unpaid, and that at the sale the appellants each purchased certain tracts of the lands (described in the bill) and paid for the same the full value thereof for a good title thereto under the impression and belief, that by such purchase they did acquire a good title; that the appellants received deeds for the respective tracts purchased by them from Mrs. Bowie, and entered into possession of the tracts so purchased by them respectively, and have ever since remained in possession as the owners thereof. See the deeds on pp. 6, 7 and 9, of the record.

That the proceeds of sale paid by appellants went to the support of Mrs. Bowie, when it would have gone, but for the sale of November 19, 1866, to the extinguishment of all interest of the said Martha B.; that after the money had been expended to pay the annuity contracted to be paid by Martha B., she sought by the suit, No. 3668, on the law side of the court to recover back the lands, and has obtained judgment therefor upon her naked legal title under said will, and the inheritance from her brothers, when, in fact, and in law her legal title was subject to the superior equities of Mrs. Bowie arising under the judgment of the probate court, and the deed of November 19, 1866, nor could Martha B. have any available legal right except after payment of debts and

expenses of administration, or through her purchase under the deed of November 19, 1866, subject to the reservations therein contained.

And the bill further alleges that the administration of the estate was never closed in any manner other than the sale and purchase, as evidenced by the deed of November 19, 1866.

ARGUMENT.

Upon the facts as stated in the bill and exhibits, the appellants are entitled to be subrogated to all the rights which Mrs. Bowie had by force of the judgment lien and of the lien reserved in the deed between her and Mrs. Leatherman, now Mrs. Burns, and her husband, the sale by Mrs. Bowie to the appellants having the effect to place them in the attitude of equitable assignees of said liens, and to entitle them to a release from the appellees, or repayment by them to the appellants of the purchase money with interest, less the use and occupation of the premises over and above improvements.

Webb v. Williams, Walker's Rep., (Mich.) 544.

Valle v. Fleming, 29 Mo., 152.

Gibson v. McCormick, 10 Gill. & J., 65.

Mair v. Berkshire, 52 Ind., 149.

Logan v. Taylor, 20 Iowa, 297.

McSorley v. Larissa, 100 Mass., 270.

Smith v. Hitchcock, 130 Mass., 570.

Zylstra v. Keith, 2 Desau's Eq., 140.

Wolf v. Lowery, 10 La. Ann., 272.

Brobust v. Brock, 10 Wall., 519.

Kirkland in re, 14 Nat. B. R., 139.

Hunt v. Mayfield, 31 Conn., 488.

Barnes v. Mott, 64 N. Y., 397.

Edwards v. Applegate, 70 Ind., 325.

Jackson v. Bowen & Neff, 7 Cow., 13.

These authorities conclusively establish the proposition contended for by appellants. If the rule were otherwise it would be contrary to the plainest principles of justice and common honesty.

No question as to the statute of limitations or lapse of time arises. The lien for the payment of the allowance made by the probate court was utilized by Mrs. Bowie in the deed between her and Mrs. Leatherman, and was the foundation for the lien therein reserved; and the appellants ever since the conveyance to them by Mrs. Bowie, have been and now are in possession of the premises as purchasers from her in good faith, and no attempt was made to disturb them until the institution of, and recovery in, the action of ejectment.

The case of *Caldwell v. Palmer, 6 Lea, (Tenn.) 652,* is conclusive on this point. There, the bill was filed to re-

cover the purchase money of the land of an intestate which had been sold for the payment of the debts of the estate under judicial proceedings that were void, and the land had been recovered in ejectment by the heir, who pleaded the statute of limitations as one of the defenses to the bill; and the court, after speaking of instances in which the statute might be a bar, said:

"But the rule applies only where the personal representative or the legatee is seeking, as the creditor would have been compelled to do, to subject the realty descended and held by the heir. After the land has been actually subjected by judicial proceedings, and the purchaser of the property in good faith, has gone into possession, and the heir recovers the land because of some defect in the proceedings, another principle comes into play. The parties stand as if the person under disability had made the sale, and afterwards had it set aside. In such a case, if the party come into equity to remove the cloud from his title occasioned by the judicial proceedings, or, under our recent statute and decisions, to recover the land by an ejectment bill, it is clear that equity would not give him relief unless he did equity by refunding whatever benefit he may have received under the sale. If now he chooses to sue at law for the land, the identical question arises as was considered in *Herring v. Pollard, 4 Hump., 362*, and other cases above cited. Can he deprive the person in possession of the land in good faith claiming under the title acquired by the judicial sale, of a conceded equity by going into the legal forum? Clearly not.

The court of chancery will enforce the equity in this, as in the other cases by entertaining a bill for the purpose, and for the same reason that the relief cannot be had at law. In such cases, as our authorities abundantly show, time will not affect the equity.

Alston v. Boyd, 6 Hump., 504.

Hilton v. Duncan, 1 Cold., 313.

Ridley v. McNairy, 2 Hump., 164.

Pilcher v. Smith, 2 Head, 209.

The reason is, that neither the statute of limitations nor lapse of time have any application to a bill in chancery in which the complainant is resisting the defendant's demand by some equity inherent in the right or covenant on which the demand is rested, or claiming an equitable set off.

Hotchkiss v. Fortson, 7 Yerg., 67.

Lewis v. Brooks, 6 Yerg., 166.

In Arkansas the death of a decedent fixes a lien upon his lands for the payment of debts, and they pass to his heirs or devisees charged with such incumbrance, and when a creditor's debt has been duly probated and not paid, he may in equity subject them in the hands of the heirs or devisees or their alienees, to the payment of the debt.

Hall v. Brewer, 40 Ark., 433, and cases there cited.

And in *Rogers v. Mayes, 37 Ark., 155,* it was decided that there was no statute bar against the enforcement of pro-

bate court allowances, and that nothing short of gross laches or unreasonable delay could have that effect. In this case there was *no* delay. Mrs. Bowie, as above shown, subjected the lands to her claim by force of the deed between her and Mrs. Leatherman, *within less than four months* after the claim was allowed by the probate court.

The attempt on the part of Mrs. Leatherman, now Mrs. Burns, to avoid the contract she had made with Mrs. Bowie by resorting to a recovery in ejectment without restoring the purchase money, was an aggravated fraud against innocent purchasers. Happily, however, the right of subrogation is exclusively of equitable cognizance, and entitles the appellants to the relief they seek, notwithstanding the judgment recovered in ejectment.

Respectfully submitted,

F. W. COMPTON,
For Appellants.

Supreme Court of the U[illegible]

OCTOBER TERM, 19[illegible]

REYNOLDS

v.

No. 364.

BURNS.

Appeal from the District Court of the U[illegible]
the Eastern District of [illegible]

BRIEF FOR [illegible]

Supreme Court of the United States.

OCTOBER TERM, 1890.

REYNOLDS

v. No. 364.

BURNS.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR APPELLEES.

The first objection that we make is that this court has no jurisdiction. The only allegations of value in the bill are that the whole property of the estate of Bowie was not worth $6000 (2); that H. H. Halley paid $1180 for one tract of land; that Springer paid $40.50 for another, and that S. F. Halley paid $71 for another (3).

As to its merits the bill had none.

Though the contents of it are not stated in the bill, yet a copy of the will of John J. Bowie is filed with it (11), by which

it seems that he left all of his estate to be divided equally between his wife and his two sons, John R. and James W. Bowie, except $1000 to be paid to his daughter, Martha B. Leatherman. On the death of Mrs. Bowie her interest in the estate was to go to his daughter and his two sons above named, equally. It may be inferred from the statement on page 1 of the bill that these sons had both died before the 19th day of November, 1866, though when, or what heirs they left, is not disclosed. The bill also states that Mrs. Bowie "had an interest as heir of her sons in certain lands" (2), the extent of the interest not being declared; nor is it stated what lands were recovered in the ejectment suit.

Supposing that one or both of the sons died intestate without children, it would be easy to ascertain by the local law what interest their mother and Mrs. Leatherman would take in their lands; but that inquiry seems to be unnecessary, since the bill claims whatever interest Mrs. Leatherman (now Mrs. Burns) may have in them; though it is not stated what interest in these lands was recovered in the ejectment suit, if any. That no decree could be rendered on such a bill if taken *pro confesso* is obvious.

If we understand the theory of the bill, of which we are not by any means sure, not having been favored with a copy of the brief for the appellants, the bill itself being peculiarly devious and dark, it is that as Mrs. Bowie conveyed the land to Leatherman and wife upon conditions not performed, resulting in a sale by the grantor under a power contained in the deed, the result was that the sale under the power carried with it not only the estate of Mrs. Bowie, but also that of Mrs. Leatherman.

To this proposition there are various answers. If the estate of Mrs. Leatherman passed in this way it passed by operation of law, and not as the result of any equity. Such a defence then if valid should have been set up in the action of ejectment; and may have been for all that is shown by the bill.

Besides, Mrs. Leatherman was a married woman, and her estate in the lands could only be conveyed in the manner prescribed by the statute.

Mansfield's Digest, sec. 648.

Under no circumstances could any argreement on her part be specifically enforced.

Rockafeller v. Oliver, 41 Ark., 169.

Bowden v. Bland, 53 id., 53.

Waters v. Wayley, id., 509.

Moreover the deed from Mrs. Bowie to Leatherman and wife, though it contained covenants on his part, contained none on the part of his wife (14). It retained "a lien upon all the property of said estate." It was only under that lien that the subsequent sales under the power were made. In her deed to the purchasers Mrs. Bowie used the words "grant, bargain and sell," which implied a covenant on her part only as against alienations and clouds made and imposed by herself.

Mansfield's Dig., sec. 639.

Winston v. Vaughan, 22 Ark., 72.

Haskell v. State, 31 id., 102.

The word subrogation is often used in the bill. To what end is not very apparent. Probably the plaintiffs wish to sub-

rogate themselves to the right of Mrs. Bowie to a support under her agreement with Leatherman. If so various objections might be made. Whether she is living or dead is not stated. As every reasonable intendment exists in favor of the judgment in ejectment, we must presume that she was dead when it was rendered. Any way the extent of the title of the plaintiffs under their purchase from her is a legal question with which a court of chancery has nothing to do.

We take it that the mere use of the word subrogation in a bill will not suffice to give a court of chancery jurisdiction. Application of the principle cannot be made on the case presented. We understand that where a void sale has been made the purchaser, having paid the purchase money, may, by subrogation, acquire the rights of the person who received the money; also that one purchasing a void security for a debt may be subrogated to the original consideration upon which the security was based. We do not mean to state the principle accurately, but merely to refer to it. The doctrine has no application where the sale was not void, where it conveyed a title, though it may not have been as nearly perfect as the purchaser supposed he was to get.

"The distinction between void sales and defective titles must be kept in view, to avoid any misapprehension of the rights of one who has purchased at an execution or judicial sale, without in fact obtaining anything. If he obtains nothing because of a defect in the proceedings, he can defeat an action for the amount of his bid. If on the other hand the proceedings are perfect, but the defendant, or ward, or decedent had no title to be sold or conveyed, the purchaser is nevertheless bound by his bid. *Caveat emptor* is the rule of all execution

and judicial sales. Each bid is made for such title as the defendant, ward, or decedent may have, and is therefore binding whether either had title or not."

Freeman on Void Judicial Sales, sec. 48.

Osterberg v. Union Trust Co., 93 U. S., 424.

The bill states that "at said sale your orators each purchased certain tracts or parts of said lands, and paid for same the full value thereof for a good title thereto, *under the impression and belief that by such purchase they acquired a good title to so much of said lands.*"

This merely shows a mistake of law on the part of the plaintiffs, which is said to excuse no one. Surely their mistake of law would not enlarge their title at the expense of Mrs. Leatherman, who did nothing to mislead them. There was no covenant on her part as to the extent of the title that the plaintiffs were to get at the sale; and such a covenant by her, even if made, would have been void, she being a married woman.

Chrisman v. Partee, 38 Ark., 31.

Stidham v. Matthews, 29 id., 650.

Holland v. Moon, 39 id., 120.

Batte v. McCaa, 44 id., 398.

All the covenants made in the deed between Mrs. Bowie and Leatherman and wife were made by Mrs. Bowie and by Leatherman (15).

Even if Mrs. Leatherman had joined in the covenants, which she did not, they would not have been binding on her.

Jefferson v. Edrington, 53 Ark., 564.

Benton Co. v. Rutherford, 33 id., 640.

Bayley v. Fletcher, 44 id., 161.

Bank of America v. Banks, 101 U. S., 240.

It is needless to discuss the legal aspect of the claim that Mrs. Bowie had against the estate. The plaintiffs do not pretend that they bought it, or that they even thought that they were buying it. It may be that Mrs. Bowie could not enforce it against the lands which she conveyed to the plaintiffs. It does not appear that she ever tried to do that; but her right to the claim itself is not otherwise impaired save by the implied release of the lands conveyed by her from the supposed lien, if any existed; and she could still enforce it against any other property belonging to the estate not released by her. In any event no controversy could settle her right to the claim unless she or her legal representatives were made parties to the suit.

Respectfully,

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